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No. 98-183

In the
Supreme Court of the United States
October Term, 1997

LANDGATE, INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, LECHUZA VILLAS WEST, AND HORWATH ASSOCIATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

For 24 years, amicus Pacific Legal Foundation (PLF) has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on two occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). PLF has participated as an amicus curiae in virtually every major real property takings case heard by this Court in the past two decades. PLF attorneys are also counsel of record in no fewer than four pending petitions for writ of certiorari seeking this Court's review of erroneous interpretations of the Takings Clause.[1]

One of these petitions was filed on behalf of amicus Lechuza Villas West (Lechuza), a California limited partnership whose beachfront lots respondent California Coastal Commission has forced to remain economically idle for seven years. *See Lechuza Villas West v. California Coastal Commission*, No. 98-30 (filed June 30, 1998). Like petitioner in the present case, Lechuza was the victim of a ruling by a court determined to escape the compensation mandate of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Like the court below, the state court in Lechuza's case held that Lechuza's takings claim could not possibly ripen before Lechuza had established—by a judicial decree in separate litigation against the Coastal Commission—that it had a right to develop its land under state law. *See Lechuza Villas*

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this amicus curiae brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution to the preparation or submission of this brief.

West v. California Coastal Commission, 70 Cal. Rptr. 2d 399, 410-11 (Ct. App. 1997). Like the court below, therefore, the court in Lechuza's case held that Lechuza could not recover damages for a temporary taking *even if* the Coastal Commission had decided that Lechuza could not build on its property, *even if* that decision had deprived the property of all economically viable use, and *even if* state law did not justify the agency's decision.

Finally, amicus Horwath Associates (Horwath) is a California partnership whose rental property was damaged by government action (refusal to approve requested rent increases) that failed to substantially advance any legitimate state interest. *See Horwath v. City of East Palo Alto*, No. 376167, slip op. at 5-6 (Cal. Super. Ct. San Mateo Cty. June 13, 1994) ("The City and its Board further acknowledge that neither at the time nor in this trial has any good cause been shown pursuant to either the Ordinance or the Regulation for any delay beyond the mandatory time limits . . . ."). Despite this failure, the California Court of Appeal ruled that Horwath could not recover damages for a temporary taking during the period spent overturning the government's action in litigation. Like the court below, the court of appeal in Horwath's case concluded that the period during which the taking was effective constituted merely "a delay attributable to the normal workings of governmental and legal processes, a situation *First* [*English*] declined to address." *Horwath Associates v. City of East Palo Alto*, No. A067695, slip op. at 10 (Cal. Ct. App. Apr. 30, 1996). Although the California Supreme Court originally granted review in Horwath's case, review was dismissed once the *Landgate* decision was handed down. Represented by PLF, Horwath intends to file a petition for certiorari seeking review of the court of appeal's decision on or before October 6, 1998.

ARGUMENT

The petition has already explained how the decision below conflicts with this Court's temporary takings jurisprudence. The following brief demonstrates how the decision also conflicts with the Court's ripeness jurisprudence, with the axiom of takings law that the public should bear the burdens of regulation designed to benefit the public, and with the decisions of two other state courts of last resort.

I

THE CONFLICT WITH *WILLIAMSON COUNTY* AND OTHER RIPENESS DECISIONS

In *First English*, the lower court had held that "a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07. This Court explicitly "disagree[d]" with that holding, concluding that the Takings Clause "would require compensation for that period." *Id.* at 307. The Court went on to hold that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. The Court emphasized that mere invalidation of the regulatory action "without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id.* at 322.

In the present case, it cannot be disputed that the Coastal Commission's steadfast refusal to approve the application of petitioner Landgate, Inc. (Landgate) to build a home on its lot deprived that property of all economically viable use. As in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992), that refusal "had the direct effect of barring [Landgate] from erecting any permanent habitable structures on [its property]." Indeed, the trial court found that

> Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions.

Appendix to Petition for a Writ of Certiorari (Pet. App) at 101a. The court of appeal affirmed this finding, observing that "[t]he Commission does not argue that a viable use of the land remained after the permit denial." *Id.* at 69a. Even the California Supreme Court conceded this point (if obliquely) when it observed that "each time there is a delay in the development process"—such as the two-year delay occasioned by the Coastal Commission's refusal to grant Landgate a development permit —"the delay may be said to temporarily deprive the developer of undeveloped property of use of that property." *Id.* at 26a.

Given the rule in *First English* and given the fact of Landgate's loss of economically viable use, it would seem a fairly straightforward conclusion that Landgate is entitled to "payment of fair value for the use of the property during" the two years that its property was forced to remain economically idle. *First English*, 482 U.S. at 322. How did the *Landgate* majority escape from this conclusion? Certainly not by asserting boldly that *any* delays occasioned by a judicial determination of a land-use restriction's validity merely constitute "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," which *First English* arguably excluded from the compensation mandate. 482 U.S. at 321. No, such an assertion would have been too obvious a departure from the text of *First English* and too obvious an adoption of the *First English* dissent—a point rightly emphasized by the *Landgate* dissenters and by the petition. *See* Pet. App. at 38a (Chin, J., dissenting); *id.* at 48a (Brown, J., dissenting); Pet. at 21-24. Rather, in the end, the *Landgate* majority "distinguished" this Court's decision on grounds of *finality*, reasoning thus:

> *First English* merely stands for the proposition that once a government action *finally denies* all economically viable use of property, the fact that the government later rescinds that action after a judicial proceeding does not relieve it of its duty to pay compensation.

Id. at 32a (emphasis added).

The notion of finality that was conceived by the California Supreme Court in *Landgate* is fundamentally flawed. Not only is that notion irreconcilably in conflict with this Court's ripeness jurisprudence, it will usher in a legal regime in which the principle of compensation for temporary takings is rendered wholly theoretical.

After noting generally at the beginning of its analysis that this Court "has emphasized that the question whether property has been taken is not ripe for decision until a government agency has rendered a final decision on the use to which the property in question may be put," *id.* at 14a (citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985)), the *Landgate* majority sharpened its focus in Part II.C of its opinion. In setting forth "the critical difference between this case and *Lucas* and *First English*," the court opined that "an essential prerequisite to the assertion of a takings claim is 'a final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" *Id.* at 28a (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). The immediately following sentence set forth the court's conception of a final determination:

> If a would-be developer fails to meet legitimate conditions for obtaining a development permit, then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally

> permitted on the subject property," but merely a *conditional denial*.

Id. at 28a-29a (emphasis added).

This proposition has a superficial plausibility, conjuring up a would-be developer who fails to submit any development plan at all, *cf., e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (noting that the property owners had "not submitted a plan for development of their property as the [zoning] ordinances permit"), or who fails to submit a development plan that provides for sufficient street access, sewer service, police protection, and water service, *cf., e.g., MacDonald*, 477 U.S. at 343. But as used by the California Supreme Court, the phrase "fails to meet legitimate conditions for obtaining a development permit" has an entirely different meaning, as revealed by the court's application of that principle to the facts of the present case.

In rejecting Landgate's application to build a home on its lot, reasoned the court, the Coastal Commission did not act with finality; rather, the agency's "rejection of Landgate's development was at most *conditional*." Pet. App. at 29a (emphasis added). What made the Coastal Commission's rejection conditional rather than final? It could not have been that Landgate "fail[ed] to meet legitimate conditions for obtaining a development permit" as those words are ordinarily used. If the condition in this case was that of proposing development on a legally configured lot, then Landgate surely did not *fail* to meet it. In a prior phase of the present case, the court of appeal held that "Landgate's predecessor owned two valid, properly recorded lots" resulting from a lot reconfiguration done by Los Angeles County and that the Coastal Commission lacked authority to "reject the reconfiguration as new 'development' inconsistent with the [Coastal] Act." *Id.* at 96a. The state supreme court accepted that holding as the law of the case. *See id.* at 24a n.6. If instead the condition in this case was that of obtaining the agency's permission to reconfigure Landgate's lot, then that

condition was not *legitimate*. To rephrase the previous point, it has been determined by the California courts that "the Commission had no jurisdiction to deny [Landgate's development] permit on that ground." *Id.* at 64a.

What, then, did the *Landgate* majority actually mean by "fails to meet legitimate conditions for obtaining a development permit"? The answer is found in the court's conclusion that the Coastal Commission "could not be said to have reached a final and authoritative determination of the development on Landgate's lot *until after the dispute about the legality of the lot had been resolved*." *Id.* at 31a (emphasis added); *accord id.* at 30a ("Or to put it another way, the Commission's denial of development on [some lot] is not a final decision on that development until the dispute over whether [the lot] legally existed was resolved."). Indeed, the court identified the existence of a dispute as "the difference between this case and *First English*," explaining thus:

> Here, there was a postponement of development pending resolution of a threshold issue of the development approval process—whether the lot was legal —and not a final decision denying development. In *First English*, on the other hand, . . . there was no *dispute about a threshold issue in the development approval process*, as there was in this case, that would be a legitimate basis for postponing approval of development.

Id. at 32a (emphasis added).

In the California Supreme Court's conception of finality, then, there can be no final decision, no final and authoritative determination by a land-use agency, so long as there exists a "dispute about a threshold issue in the development approval process." *Id.* Moreover—and this is critical—until that dispute is resolved by a *court*, an application for development has not been finally denied, only conditionally denied or postponed.

Accordingly, even a property owner who is categorically prohibited from making any use of his land suffers no compensable taking (temporary or otherwise) if that prohibition results from an "impasse in the regulatory process that must be resolved through a judicial proceeding." *Id.* In other words, "a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking." *Id.* at 32a-33a.

In short, the California Supreme Court created a category that it labeled "threshold issue[s] in the development process" or "preconditions to development" or "threshold development questions." *Id.* This category was undefined but nevertheless expansive, including *both* "procedural conditions and substantive requirements on development." *Id.* at 28a. If there arises a "dispute" or "impasse" between the land-use agency and the property owner regarding these questions or issues, it "must be resolved through a judicial proceeding" before there can be "a final decision denying development." *Id.* at 32a. This passive-voice formulation, however, hides the last, critical detail of the *Landgate* majority's scheme: the required "judicial determination" does not magically fall from the sky; rather, to obtain a final decision regarding the use of his property that will allow him to pursue a regulatory takings claim, "*a developer* must resort to such a proceeding." *Id.* at 32a-33a (emphasis added). In one sentence: *Landgate* held that as to some expansive category of development conditions imposed by a land-use agency, a property owner must affirmatively seek judicial review of the agency's position in order to obtain a final decision that renders the owner's takings claims ripe.

To state this holding is fairly to expose its error. Consider first *Williamson County*. In setting forth the finality requirement in that decision, the Court rejected the argument that the requirement was inconsistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held that an aggrieved

person need not "exhaust administrative remedies before bringing a § 1983 action." *Williamson County*, 473 U.S. at 192. The Court carefully explained why finality and exhaustion are "conceptually distinct": the former "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"; the latter, by contrast, "refers to administrative and *judicial procedures* by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* at 192, 193 (emphasis added). The Court went on to illustrate the difference between the two concepts by "comparing the procedure for seeking a variance [from a land-use agency] with the procedures that, under *Patsy*, [the owner] would not be required to exhaust." *Id.* at 193. Observing that "the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities," the Court nevertheless explicitly held that the property owner "would ***not*** be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial." *Id.* (emphasis added).

The contrast between *Williamson County* and the decision below could not be more clear: if this Court's decision was that a property owner "would ***not*** be required to resort to [judicial] procedures," the California Supreme Court's decision was that a property owner "***must*** resort to [a judicial] determination" in order to obtain a final and authoritative determination by the agency. Pet. App. at 33a (emphasis added). Thus, while the respondent in *Williamson County* was ***not*** required to "seek a declaratory judgment regarding the validity" of the land-use agency's disapproval of a subdivision plan in order to obtain a final decision from that agency, 473 U.S. at 193, Landgate ***was*** required to seek "a judicial determination of the validity" of the Coastal Commission's denial of a development permit in order to obtain a final decision from that agency. *Cf.* Pet. App. at 25a (rejecting Landgate's contention that there was a final decision

denying all economically viable use of its property "from the time the development permit was denied in February 1991 until the time it was approved in February 1993 after the lot line issue had been resolved by litigation").

Following *Williamson County*, the decision in *MacDonald* confirms the conflict between this Court's ripeness jurisprudence and the decision below. After having reiterated that a takings claim is ripe when "a court knows what use, if any, may be made of the property," the Court spoke to the very point at issue here: "A property owner is of course not required to resort to *piecemeal litigation* or otherwise unfair procedures in order to obtain this determination." *MacDonald*, 477 U.S. at 350 & n.7 (emphasis added); *accord id.* at 363 (Powell, J., joined by Burger, C.J., dissenting) (quoting this statement with approval). But "piecemeal litigation" is precisely what the California Supreme Court has endorsed. In the present case, the agency relented after only one round of "pre-finality" litigation. Yet while remaining entirely faithful to the decision below, the agency could have forced Landgate to sue it again and again. If the first round of litigation concerned "lot configuration," the second round could have concerned "compliance with the Subdivision Map Act," the third round "compliance with CEQA [California Environmental Quality Act]," and succeeding rounds any of myriad "other threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed." Pet. App. at 33a; *see also id.* at 33a-34a (citing, *as merely exemplary*, 11 different instances of "threshold development questions").

If the decision below is inconsistent with this Court's ripeness jurisprudence, it also takes California law back to the pre-*First English* era for all practical purposes. While the *Landgate* opinion would appear to hold open the possibility that there are certain issues that do not qualify as "threshold" issues, certain conditions that do not count as "preconditions," that possibility is merely theoretical. As mentioned above, the kinds of issues

that fall within the *Landgate* rubric cover the spectrum, including both "procedural conditions and substantive requirements on development." Pet. App. at 28a. Indeed, as an example of a case involving "threshold development questions," *Landgate* cited *Bel Mar Estates v. California Coastal Commission*, 171 Cal. Rptr. 773 (Ct. App. 1981), describing it as a case in which the "Commission correctly construed [its] statutory authority to deny development." Pet. App. at 33a, 34a. The citation to *Bel Mar Estates* is telling, for that case involved simply the question whether "the grounds given by the commission for denying the application" for development "conform[ed] to the policy of the [Coastal Act]." 171 Cal. Rptr. at 775-76.

Yet if the question whether a proposed development conforms with the statute administered by the land-use agency is a "threshold" question, if the condition that such a development comply with the statute is a *pre*condition, then *every* question is a threshold question and *every* condition is a precondition. The notion of finality (or rather *non*-finality) conceived by the court below has no limits. Accordingly, to paraphrase *Lucas*, the concept of a threshold development question or a precondition to development "cannot be the basis for departing from [the] categorical rule that [temporary deprivations of all economically viable use] must be compensated. If it were, departure would virtually always be allowed." 505 U.S. at 1026.

Because the California Supreme Court has decided an important question of takings procedure in a way that conflicts with relevant decisions of this Court, review is warranted under Rule 10(c).

II

THE CONFLICT WITH THE PRINCIPLE THAT PUBLIC BURDENS SHOULD BE BORNE BY THE PUBLIC

In the lower court's own description, the Coastal Commission's refusal to allow Landgate to build a house on its lot was "a legally erroneous decision of a government agency during the development approval process resulting in delay." Pet. App. at 15a. The court conceded that, from Landgate's point of view, the delay resulting from this erroneous decision (or "regulatory mistake," *id.*) had an impact that was "identical" to the "denial of all feasible use." *Id.* at 26a. In general, the court further conceded, the delay resulting from a regulatory mistake "may be said to temporarily deprive the developer of undeveloped property of use of that property." *Id.* Notwithstanding these concessions, the *Landgate* majority heaped the burden of governmental mistakes onto property owners, holding that such mistakes are "part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution." *Id.* at 19a.

This allocation of burdens is fundamentally in conflict with the bedrock principle of takings law: "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). It may well be that property owners must bear the burdens of obtaining a final *administrative* decision. In all fairness and justice, however, it is the public who should bear the burden of regulatory mistakes that must be corrected through *litigation*. After all, it is the public who presumably benefits from the "reasonable regulatory process designed to advance legitimate government interest," *Landgate*, Pet. App. at 18a,

which produced those mistakes in the first place. It is no excuse that regulatory mistakes are somehow inevitable given that "[t]he resolution of these cases often turns on the construction and application of complex statutory schemes." *Id.* at 33a. Again, it is the public—not the victimized property owners—who presumably benefits from the mistake-generating schemes; therefore, it is the public who ought to bear the burden when the resulting mistakes "temporarily deprive the developer of undeveloped property of use of that property" during the course of litigation overturning those mistakes. *Id.* at 26a.

This, we submit, is the teaching of *First English*. Back in *Williamson County*, this Court assigned property owners rather than the public much of the burden of obtaining permission to make economically viable use of their land by requiring them to spend considerable time and effort extracting a "final decision" from the administrative process. But in *MacDonald*, the Court set a limit, declaring that the burden on property owners "of course" did not extend so far as to require them "to resort to piecemeal litigation" to obtain this final decision. 477 U.S. at 350 n.7. *First English* confirmed this limit and made it more concrete: "invalidation of [a regulatory mistake] without payment of fair value for the use of the property during [the period spent overturning the mistake through litigation] would be a constitutionally insufficient remedy." 482 U.S. at 322. Once the property owner is forced to resort to the judicial process, the government's mistakes must be borne by the government. This is fairness and justice.

III

THE CONFLICT WITH OTHER STATE COURTS OF LAST RESORT

While the California Supreme Court's decision is arguably consistent with the decisions of some state courts of last resort, *see Landgate*, Pet. App. at 15a (citing cases), it is definitely in conflict with the decisions of two others.

A. Nebraska Supreme Court

In *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994) (*Whitehead Oil II*), the company applied for a use permit to build and operate a service station and convenience store on its property consistent with the existing zoning. The city, "react[ing] to the arguably valid concerns of its citizens in the area," modified the property's zoning designation and denied the application as inconsistent with that designation. *Id.* at 678. That was in June of 1987. Nearly seven years later, after two trips through the Nebraska court system, the company succeeded in having the zoning change declared invalid under state law: the Nebraska Supreme Court concluded that "the city acted arbitrarily and capriciously in changing the zoning designation of the [company's] parcel"; the court "direct[ed] the district court to remand the matter to the city, ordering it to issue Whitehead Oil the permit it seeks." *Id.* at 678, 680.

Having ruled for the oil company on this state-law zoning issue, the Nebraska Supreme Court then considered the company's additional claims for "damages in inverse condemnation under both the U.S. and Nebraska Constitutions." *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 401, 405 (Neb. 1994) (*Whitehead Oil III*) (companion case decided the same day as *Whitehead Oil II*). Those takings claims sought compensation in an amount equal to "the fair rental value of its property as a site for a convenience store . . . *from the date its use permit should have issued*," not from the date on which the city's actions were invalidated. *Id.* (emphasis added).

How would the California Supreme Court have treated these claims under the *Landgate* analysis? The answer is not at all difficult. To paraphrase *Landgate* only slightly: The city "could legitimately require" that any development of the company's property be consistent with all validly adopted zoning designations. *Landgate*, Pet. App. at 31a. Therefore, when the city determined that the company's development proposal was not consistent with the newly changed zoning, "it could legitimately litigate the [question of the zoning change's validity] without offending the takings clause." *Id.*[2] That is, the city "could not be said to have reached a final and authoritative determination of the development on [the company's parcel] until after the dispute about the legality of the [zoning change] had been resolved." *Id.* To sum up:

> In light of the foregoing, the difference between this case and *First English* [is] clear. Here, there was a postponement of development pending resolution of a threshold issue of the development process—whether the [zoning change] was [valid]—and not a final decision denying development. In *First English*, on the other hand, . . . there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of [Whitehead Oil's] development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.

Pet. App. at 32a.

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[2] The legitimacy of this litigation derives in part from the presumption of validity that attaches to all zoning ordinances in Nebraska (as no doubt in every other jurisdiction). *See, e.g., Whitehead Oil II*, 515 N.W.2d at 397 (holding that, "[i]n passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities").

But how instead did the Nebraska Supreme Court actually treat the company's takings claims? As opposed to a reading of *First English* that emphasized that decision's "narrowness" and its "implied limitation[s] on the temporary takings doctrine," *Landgate*, Pet. App. at 13a, the Nebraska Supeme Court took *First English* at face value: "a landowner may sue for damages when property is 'taken' by government regulation, even if the taking is only temporary *and the regulation later invalidated.*" *Whitehead Oil III*, 515 N.W.2d at 407 (emphasis added). Thus, the court did not engage in sophistic(ated) inquiry as to whether the city could "legitimately litigate" some "threshold issue of the development process." Rather, the court asked the straightforward question whether the city's denial of the use permit satisfied this Court's familiar two-pronged test for a categorical taking: "[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 408 (alterations in original) (quoting *Nollan v. California Coastal Commission*, 483 U.S. 823, 834 (1987)).

Emphasizing an obvious point that seemed to escape the California Supreme Court—that the foregoing is "a disjunctive test under which a taking results if either element is not met," the Nebraska Supreme Court concluded that the city's action failed the first prong of the test. *Id.* That conclusion alone was sufficient to award damages to the company for a temporary taking; no further inquiry was necessary. *See id.* Moreover, these damages accrued ***not*** from the date of the "judicial determination of the validity of certain *preconditions to development*," *Landgate*, Pet. App. at 32a, but from "the date of the city's refusal to permit [the requested] use of the land" to "the date the city issues the permit Whitehead Oil seeks," *Whitehead Oil III*, 515 N.W.2d at 412. In Nebraska, therefore, a property owner ***can*** "recover damages for the time before it is finally determined that the [challenged government action] constitutes a 'taking' of his property." *First English*, 482 U.S. at 306-07. In so holding, *Whitehead Oil* cannot be reconciled with *Landgate*.

B. Idaho Supreme Court

Also in conflict with the decision below is the decision of the Idaho Supreme Court in *McCuskey v. Canyon County Commissioners*, 912 P.2d 100 (Idaho 1996) (*McCuskey II*). In that case, a property owner sought to construct a convenience store, a use authorized by the zoning in existence when he purchased the property. In 1986, the county initially granted a building permit, but quickly revoked it on the ground that the convenience store was inconsistent with a 1979 zoning ordinance that purported to downzone the property from "heavy industrial" to "rural residential." *See id.* at 101-02. The property owner challenged the county's action in a declaratory judgment action; more than six years later, the Idaho Supreme Court declared the 1979 ordinance void under state law. *McCuskey v. Canyon County*, 851 P.2d 953, 959 (Idaho 1993) (*McCuskey I*). The owner then sought "compensation for the County's interference with his use of the property, which he contends constituted a taking, during the period following the [revocation of the building permit] and until the date the opinion in *McCuskey I* was filed." *McCuskey II*, 912 P.2d at 103. That is, the property owner sought damages for a temporary taking pursuant to *First English*. The trial court denied relief on the ground that the takings claim was barred by the statute of limitations. *See id.* On appeal, the critical question was when did the takings claim first accrue.

Under *Landgate*, this would be an easy question: Because the judicial decision voiding the 1979 zoning ordinance was nothing more than "a judicial determination of the validity of certain *preconditions to development*" (namely, the precondition of compliance with 1979 zoning ordinance), the time spent obtaining that decision was "a normal part of the development process," and the six-year "postponement of [the owner's] development therefore does not constitute a temporary taking of property." *Landgate*, Pet. App. at 32a. Under this analysis, the takings claim could have accrued no earlier than the decision in

McCuskey I in 1993. The Idaho Supreme Court, however, gave an irreconcilably different answer:

> The time of taking occurs . . . as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, [the property owner] was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, *the date that [he] was notified . . . that he could not build the convenience store.*

McCuskey II, 912 P.2d at 104 (citations omitted and emphasis added).

In *Landgate*, the "full extent of the plaintiff's loss of use and enjoyment of the property" became apparent no later than February of 1991, the date that the Coastal Commission denied Landgate's application to build a house on its property, in the process making clear that it would not approve any development. *See supra* pp. 3-4. Yet, in contrast to the Idaho Supreme Court in *McCuskey II*, the California Supreme Court in *Landgate* ruled that a taking did not occur—and, indeed, could not have occurred—at that time. This conflict, in conjunction with the conflict between the decision below and the decision of the Nebraska Supreme Court in *Whitehead Oil*, demonstrates that the present case warrants review under Rule 10(b).

CONCLUSION

Landgate's petition for certiorari should be granted.

In light of the close connections between the present case and *Lechuza Villas West v. California Coastal Commission* (No. 98-30), *see supra* pp. 1-2, the Court may also wish to consider consolidating the two cases or at least holding *Lechuza* pending the final disposition of the present case.

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Respectfully submitted,

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